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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 WILLIAM TERRY,  
11 CDCR #K-89959,

12 Plaintiff,

13 vs.  
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15 JEAN WOODFORD, et al.,  
16

17 Defendant.  
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Civil No. 07cv2360 J (POR)

**ORDER:**

**(1) GRANTING MOTION TO PROCEED  
IN FORMA PAUPERIS, IMPOSING NO  
INITIAL PARTIAL FILING FEE,  
GARNISHING \$350 FROM PRISONER'S  
TRUST ACCOUNT [Doc. No. 4];**

**(2) SUA SPONTE DISMISSING  
AMENDED COMPLAINT FOR FAILING  
TO STATE A CLAIM PURSUANT TO  
28 U.S.C. §§ 1915(e)(2) and 1915A(b)**

21 Plaintiff, William Terry, a state prisoner currently incarcerated at the Richard J. Donovan  
22 Correctional Facility and proceeding pro se, has filed a civil rights action filed pursuant to 42  
23 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a);  
24 instead, he has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C.  
25 § 1915(a) [Doc. No. 4].

26 **I. Motion to Proceed IFP [Doc. No. 4]**

27 All parties instituting any civil action, suit or proceeding in a district court of the United  
28 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. See 28

1 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee  
2 only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*  
3 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to  
4 proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their  
5 action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d  
6 844, 847 (9th Cir. 2002).

7 Section 1915, as amended by the Prison Litigation Reform Act ("PLRA"), further  
8 requires that each prisoner seeking leave to proceed IFP submit a "certified copy of [his] trust  
9 fund account statement (or institutional equivalent) ... for the six-month period immediately  
10 preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2). Using these certified trust  
11 account statements, the Court must assess an initial payment of 20% of (a) the average monthly  
12 deposit, or (b) the average monthly balance in the account for the past six months, whichever  
13 is greater, and collect that amount as the prisoner's initial partial filing fee, unless he has no  
14 current assets with which to pay. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4); *Taylor*,  
15 281 F.3d at 850. Thereafter, the institution having custody of the prisoner must collect  
16 subsequent payments, assessed at 20% of the preceding month's income, in any month in which  
17 his account exceeds \$10, and forward those payments to the Court until the entire filing fee is  
18 paid. *See* 28 U.S.C. § 1915(b)(2); *Taylor*, 281 F.3d at 847.

19 The Court finds that Plaintiff has submitted an affidavit that complies with 28 U.S.C.  
20 § 1915(a)(1) [Doc. No. 4] as well as a certified copy of his prison trust account statement  
21 pursuant to 28 U.S.C. § 1915(a)(2) and Civil Local Rule 3.2. Plaintiff's trust account currently  
22 indicates that he has insufficient funds from which to pay an initial partial filing fee.

23 Accordingly, the Court hereby **GRANTS** Plaintiff's Motion to Proceed IFP [Doc. No.  
24 4], and assesses no initial partial filing fee at this time. *See* 28 U.S.C. § 1915(b)(1) (court shall  
25 assess initial partial filing fee only "when funds exist"); 28 U.S.C. § 1915(b)(4) ("In no event  
26 shall a prisoner be prohibited from bringing a civil action . . . for the reason that the prisoner has  
27 no assets and no means by which to pay the initial partial filing fee."); *Taylor*, 281 F.3d at 850  
28 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's

1 IFP case based solely on a “failure to pay . . . due to the lack of funds available to him when  
 2 payment is ordered.”). However, Plaintiff is required to pay the full \$350 filing fee mandated  
 3 by 28 U.S.C. §§ 1914(a) and 1915(b)(1), by subjecting any future funds credited to his prison  
 4 trust account to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(2).

## 5 **II. Sua Sponte Screening per 28 U.S.C. § 1915(e)(2) and § 1915A**

6 The PLRA also obligates the Court to review complaints filed by all persons proceeding  
 7 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused  
 8 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
 9 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as  
 10 practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these  
 11 provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion  
 12 thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from  
 13 defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203  
 14 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443,  
 15 446 (9th Cir. 2000) (§ 1915A).

16 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte  
 17 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is  
 18 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,  
 19 324 (1989). However, 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court  
 20 reviewing an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting  
 21 service of the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127  
 22 (“[S]ection 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis  
 23 complaint that fails to state a claim.”); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th  
 24 Cir. 1998) (discussing 28 U.S.C. § 1915A).

25 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
 26 allegations of material fact and must construe those facts in the light most favorable to the  
 27 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
 28 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s

1 duty to liberally construe a pro se's pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,  
 2 839 F.2d 621, 623 (9th Cir. 1988), is "particularly important in civil rights cases." *Ferdik v.*  
 3 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

#### 4 **A. Constitutional Claims**

5 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person  
 6 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived  
 7 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the  
 8 United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on*  
 9 *other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d  
 10 1350, 1354 (9th Cir. 1985) (en banc).

#### 11 **B. Eighth Amendment medical care claims**

12 In his Complaint, Plaintiff alleges that he was denied adequate medical attention in  
 13 violation of his Eighth Amendment rights.<sup>1</sup> In January of 2004, Plaintiff claims that he had a  
 14 seizure that led to him falling off his upper bunk in his cell. (*See* Compl. at 4.) As a result,  
 15 Plaintiff broke several ribs. (*Id.*) He further alleges that he should never have been housed on  
 16 an upper bunk because he had a chrono specifying he should be housed in a lower bunk. (*Id.*)

17 To assert a claim under the Eighth Amendment based on inadequate medical care,  
 18 Plaintiff must allege facts which show that specific individuals were "deliberately indifferent to  
 19 his serious medical needs." *Helling v. McKinney*, 509 U.S. 25, 32 (1993); *Estelle v. Gamble*,  
 20 429 U.S. 97, 106 (1976). In order to show deliberate indifference, he must allege sufficient facts  
 21 to indicate: (1) that his medical need is "serious" and (2) that prison officials acted or failed to  
 22 act in light of that need with a "culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, 302  
 23 (1991). The indifference to medical needs also must be substantial; inadequate treatment due  
 24 to malpractice, or even gross negligence, does not amount to a constitutional violation. *Estelle*,  
 25 429 U.S. at 106; *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990).

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26  
 27 <sup>1</sup> Plaintiff has previously filed these same claims in *Terry v. California Dep't of Corrections*,  
 28 *et al.*, S.D. Cal. Civil Case No. 05-1981 JM (NLS). However, it appears that Plaintiff did not pursue  
 that action because he had not exhausted his administrative remedies as required by 42 U.S.C.  
 § 1997e(a). Thus, the Court will not dismiss this action as duplicative at this stage.

1 The Court finds the allegations contained in Plaintiff's Complaint to be insufficient to  
2 show the "deliberate indifference" required to support a claim of cruel and unusual punishment  
3 under the Eighth Amendment. Plaintiff does not identify any named Defendant as having actual  
4 knowledge that he should not have been housed in an upper bunk. Nor does Plaintiff name any  
5 Defendant whom he claims was actually aware of a serious danger in housing Plaintiff in an  
6 upper bunk, and deliberately ignored that danger. Because Plaintiff has not identified any  
7 Defendant who was aware of his serious medical need to be assigned a lower bunk and  
8 deliberately ignored the serious risk to his health and safety, he has failed to state an Eighth  
9 Amendment claim with respect to being assigned an upper bunk.

10 Moreover, other than the medical doctor Defendants, Plaintiff names as the only other  
11 Defendants, Jeanne Woodford, the Director of the CDC, and Robert Hernandez, the Warden of  
12 Donovan, and seeks damages against these Defendants based on their responsibility for the  
13 workings of Donovan. Such allegations are insufficient to state a claim against these Defendants  
14 because there is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v. Sanderson*,  
15 9 F.3d 1433, 1437-38 (9th Cir. 1993). Instead, "[t]he inquiry into causation must be  
16 individualized and focus on the duties and responsibilities of each individual defendant whose  
17 acts or omissions are alleged to have caused a constitutional deprivation." *Leer v. Murphy*, 844  
18 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976)). In order  
19 to avoid the respondeat superior bar, Plaintiff must allege personal acts by each individual  
20 Defendant which have a direct causal connection to the constitutional violation at issue. *See*  
21 *Sanders v. Kennedy*, 794 F.2d 478, 483 (9th Cir. 1986); *Taylor v. List*, 880 F.2d 1040, 1045 (9th  
22 Cir. 1989).

23 As supervisors, Defendants Woodford and Hernandez may only be held liable for the  
24 allegedly unconstitutional violations of a subordinate if Plaintiff alleges specific facts which  
25 show: (1) how or to what extent they personally participated in or directed a subordinate's  
26 actions, and (2) in either acting or failing to act, they were an actual and proximate cause of the  
27 deprivation of Plaintiff's constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir.  
28 1978). As currently pleaded, however, Plaintiff's Complaint fails to set forth facts which might

1 be liberally construed to support an individualized constitutional claim against Defendants  
2 Woodford or Hernandez. Plaintiff has simply failed to identify any Defendant whom he made  
3 aware of a serious risk to his health or safety arising from being housed in an upper bunk and  
4 who deliberately ignored that risk.

5 Accordingly, the Court finds that Plaintiff's Complaint must be dismissed sua sponte for  
6 failing to state a claim upon which relief could be granted pursuant to 28 U.S.C.  
7 §§ 1915(e)(2)(B) and 1915A(b).

### 8 **III. Conclusion and Order**

9 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

10 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [doc. no. 4] is  
11 **GRANTED**.

12 2. The Secretary of California Department of Corrections and Rehabilitation, or his  
13 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee  
14 owed in this case by collecting monthly payments from the account in an amount equal to twenty  
15 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court  
16 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).  
17 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**  
18 **ASSIGNED TO THIS ACTION.**

19 3. The Clerk of the Court is directed to serve a copy of this Order on James Tilton,  
20 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,  
21 Sacramento, California 95814.

22 **IT IS FURTHER ORDERED** that:

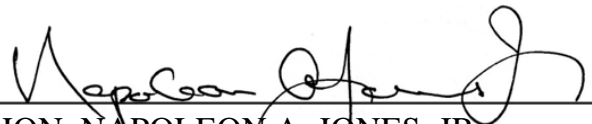
23 4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.  
24 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave  
25 from the date this Order is "Filed" in which to file a First Amended Complaint which cures all  
26 the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in  
27 itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants  
28 not named and all claims not re-alleged in the Amended Complaint will be deemed to have been

1 waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended  
2 Complaint fails to state a claim upon which relief may be granted, it may be dismissed without  
3 further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g).  
4 *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

5 5. The Clerk of the Court is directed to mail a form § 1983 complaint to Plaintiff.

6 **IT IS SO ORDERED.**

7  
8 DATED: April 11, 2008

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10 HON. NAPOLEON A. JONES, JR.  
11 United States District Judge  
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